



OFFICE OF THE POLICE COMMISSIONER
ONE POLICE PLAZA • ROOM 1400

CHAN

June 26, 2013

Memorandum for: Deputy Commissioner, Trials

Re: **Police Officer Ivan Caraballo**
Tax Registry No. 918820
Police Service Area 2
Disciplinary Case No. 2011 4918

The above named member of the service appeared before Assistant Deputy Commissioner Amy J. Porter on February 19, 2013 and February 25, 2013, and was charged with the following:

DISCIPLINARY CASE NO. 2011-4918

1. Said Police Officer Ivan Caraballo, assigned to Highway Unit #5, on or about and between January 1, 2009 and September 1, 2011, did fail and neglect to reside within the City of New York or Westchester, Rockland, Orange, Putnam, Nassau or Suffolk Counties, as required in that said Police Officer resided at a location known to the Department in New Jersey.

P.G. 203-18, Page 1, Paragraph 6

RESIDENCE REQUIREMENTS

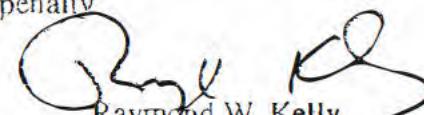
2. Said Police Officer Ivan Caraballo, assigned to Highway Unit #5, while on sick report, on or about and between July 13, 2011 and August 11, 2011, did travel to Old Bridge, New Jersey, without the approval of the Chief of Personnel.

P.G. 205-01, Page 6 Additional Data

**REPORTING SICK
PERSONNEL MATTERS**

In a Memorandum dated June 10, 2013, Assistant Deputy Commissioner Amy J. Porter found Respondent Guilty of Specification Nos. 1 and 2 in Disciplinary Case No. 2011-4918. Having read the Memorandum and analyzed the facts of this matter, I approve the findings, but disapprove the penalty.

Police Officer Caraballo's misconduct in this instant matter warrants the forfeiture of thirty (30) vacation days, as a disciplinary penalty.


Raymond W. Kelly
Police Commissioner



POLICE DEPARTMENT

June 10, 2013

MEMORANDUM FOR: Police Commissioner

Re: Police Officer Ivan Caraballo
Tax Registry No. 918820
Police Service Area 2
Disciplinary Case No. 2011-4918

The above named member of the Department appeared before me on February 19, 2013 and February 25, 2013¹, charged with the following:

1. Said Police Officer Ivan Caraballo, assigned to Highway Unit #5, on or about and between January 1, 2009, and September 1, 2011, did fail and neglect to reside within the City of New York or Westchester, Rockland, Orange, Putnam, Nassau or Suffolk Counties, as required in that said Police Officer resided at a location known to the Department in New Jersey.

P.G. 203-18, Page 1, Paragraph 6 RESIDENCE REQUIREMENTS

2. Said Police Officer Ivan Caraballo, assigned to Highway Unit #5, while on sick report, on or about and between July 13, 2011, and August 11, 2011, did travel to Old Bridge, New Jersey, without the approval of the Chief of Personnel.

P.G. 205-01, Page 6 Additional Data REPORTING SICK PERSONNEL MATTERS

The Department was represented by Mark Berger, Esq., Department Advocate's Office, and Respondent was represented by Michael Martinez, Esq.

Respondent, through his counsel, entered a plea of Not Guilty to Specification No. 1. He entered a plea of Guilty to Specification No. 2, and testified in mitigation of

¹ Disciplinary case record was reopened for Department Advocate's Office to submit additional evidence. Decision reserved on April 10, 2013.

the penalty. A stenographic transcript of the trial record has been prepared and is available for the Police Commissioner's review.

DECISION

Respondent is found Guilty of Specification No. 1.

Respondent, having pleaded Guilty to Specification No. 2, is found Guilty.

SUMMARY OF EVIDENCE PRESENTED

The Department's Case

The Department called Sergeant Michael Hengel.

Sergeant Michael Hengel

Hengel has been assigned to the Medical Division for 17 years and is currently assigned to Absence Control and Investigations Division. There he has worked for ten years as a sergeant supervising members of the service who are on sick report and investigating members of the service who are injured in the line of duty or are applying for disability pensions. His division does investigations on cases that are referred by the Internal Affairs Bureau (IAB).

On October 25th, 2010, Hengel's division received a phone call from the District Surgeon ²at the Staten Island Clinic, about safeguarding Respondent's firearm. If an officer is on certain medication, or has a particular illness or injury and the District Surgeon feels that the officer will not be able to safeguard his firearms, he issues a medical removal for the officer's firearms.

² He believed it was Dr. Hedman who called.

Hengel went to Respondent's address which was listed with the Department as [REDACTED]. When he arrived at Respondent's address, no one was home. After several phone calls he was able to speak with Respondent who told Hengel that he was at his brother's residence at [REDACTED]. Respondent did not indicate whether [REDACTED] was also his own residence, but just said that is where he was.

When Hengel met with Respondent at [REDACTED], Hengel asked Respondent where his firearms were. Respondent said they were at his girlfriend's residence in New Jersey. First they picked up the key at an apartment at [REDACTED] [REDACTED]. Then they went to an apartment at [REDACTED] [REDACTED] where Respondent retrieved and provided Hengel with four of his five firearms. The fifth firearm was at his Command.

Hengel left him in New Jersey because Respondent said something about his brother picking him up.

Hengel explained, "It was the first time that we ever had to do a gun removal, where we had to go out of state to get the firearms. There was a feeling that the officer was residing in New Jersey."

Computer checks showed that Respondent had a New Jersey Driver's license. Later Hengel learned that Respondent was driving a car registered to him with New Jersey license plates on it.

The protocol for a residency investigation involves observations, which Hengel conducted. Hengel explained that his unit normally does around a dozen observations on a residency case over a two to three month period, which is what Hengel did. He said, "Over the course of approximately four months from November of 2010 until February

of 2011, I conducted numerous observations of the officer at the residence at [REDACTED]

[REDACTED] And I believe in the neighborhood of 10 occasions I observed the officer coming home after his tour of duty was completed and going into the residence."

In response to the Court's question, Hengel explained, "It was various times but normally between 2:00 -- 2:00 and 4:00 p.m. in the afternoon. The exact times would be on my worksheets."

Hengel believed at the time he did most of the observations Respondent was on the day tour. Hengel did over a dozen observations but saw Respondent about ten times.

Hengel stated that he observed Respondent coming home after his tour of duty was over. Some days Hengel observed Respondent taking items from his car and bringing "into his residence. Other times he just went into his residence . . ."

As part of his investigation, Hengel obtained Respondent's E-ZPass records.

The dates covered in the E-ZPass Records ranged from November of 2008 through March of 2011. (Department's Exhibit [DX] 1)

Hengel explained that the records show that the five days a week that Respondent was traveling over the Outerbridge Crossing from New Jersey into New York coincided with the tours of duty that Respondent was scheduled to work. The documents did not show anything about the travel from work because the Port Authority only charges tolls one way. "So when you leave New York to go into New Jersey there's no toll. There's only a toll when you come from New Jersey into New York on those crossings."

A second set of Respondent's E-ZPass records covered from January 31, 2011 until October 9, 2011. (DX 2). At the Court's request, the Department later highlighted the crossings from New Jersey into Staten Island on the E ZPass Records, DX 1 and 2.

After reviewing these records, Hengel concluded, "It appeared that the officer was residing in New Jersey." When asked how did he know that Respondent wasn't actually residing in Staten Island, Hengel testified, "Based on the observations that I conducted, I only saw him at the address in New Jersey. I only saw his vehicle one time during any of my observations at the Staten Island address."

According to Hengel, Respondent was questioned in an official Department interview twice in 2011. Hengel, Lieutenant Valente, a Patrolmen's Benevolent Association (PBA) attorney, a PBA delegate and Respondent were present at the interview on May 4, 2011. (DX 3A) Hengel claimed that during this interview Respondent admitted that he was residing in New Jersey for about a year and a half to two years. Hengel recalled that Respondent knew he could not live in New Jersey. Respondent said the lease was in his name and his girlfriend's name because his girlfriend had difficulty getting the apartment.

Hengel further described what Respondent said during the interview: "After he says for yes, for about a year and a half to around two years he has been staying with his girlfriend, the Lieutenant said 'Okay, so then in general when you're going to and from work, it's from a residence in New Jersey?' And [Respondent] answered, 'Yes.'"

After Respondent was interviewed, Hengel's investigation did not end. Hengel explained, "When I came down and met with the first advocate that had the case, Dan Maurer, he requested that we go out and do additional observations to verify that [Respondent] was indeed complying with the residency requirements. And a short time after that [Respondent] reported sick again."

In July of 2011, Hengel did observations again, at the address in New Jersey using the same investigative strategy. Respondent was on sick report from July 13, 2011 to

August 11, 2011. Hengel saw him staying in New Jersey at the same residence, at [REDACTED]

[REDACTED] through September of 2011.

The Department policy for being out of the residence county while on sick leave is that a member of the service is not allowed to leave the residence without permission from the Chief of Personnel. Respondent did not receive this permission in this case.

During the first part of the investigation, Hengel learned that Respondent had a line of duty injury. The Employee Relations Section had given Respondent permission to stay in New Jersey while he was out sick. The dates were from October 19, 2010 through November 26, 2010. Because Respondent had received permission, Hengel could not substantiate any misconduct from that first time.

However, for the second period, there was no permission given. While he was out sick that second time, Respondent was staying at [REDACTED]
[REDACTED]

Hengel never saw a copy of Respondent's lease.

During the interview of Respondent on October 31, 2011 in which Hengel was present, Respondent was asked where was he residing during the time he was on sick report. (DX 4). According to Hengel, Respondent answered that he had gone to New Jersey several times and that his residency at the New Jersey address had ceased after the first official Department interview.

Hengel stated that there was an acknowledgement that Respondent was residing in New Jersey. Hengel testified, "Respondent provided us with a copy of the lease for [REDACTED]. I believe it was dated September 1, 2011." Hengel continued, "We did see him in New Jersey at least on one occasion, but it looked like he

was moving items out of the apartment into his vehicle. I conducted an observation or two in October 2011 and he was indeed staying at . . . [REDACTED] in Staten Island."

On continued direct examination³, Hengel explained that since the last hearing, he went to the 120 Precinct in Staten Island:

I reviewed the calls -- desk copies of the roll calls for 2009 and 2010 while Officer Caraballo was assigned there. I also went to the Highway District in Queens for the time that officer was in training for Highway and then went to Highway 5 and reviewed the desk copies of the roll calls for partial 2011. And I matched those up with the officers E-ZPass records and I prepared a worksheet with my findings.

Hengel's worksheet was a comparison of the roll calls when the officer was scheduled to work with his E-ZPass records. (DX 5).⁴ Hengel explained,

I conducted a comparison of the E ZPass records obtained via subpoena with the roll call listing of the 120 Precinct, the Highway District, and Highway Unit 5 between January 1, 2009 and September of 2011. For the period of January 1, 2009 through November 30, 2009, it showed a corresponding E-ZPass entry on the Outerbridge Crossing within an hour prior to his scheduled tour of duty on all but five dates that he was scheduled to work according to their desk copies of the roll calls. There was no roll calls available for December of 2009. So for that one month period there was no roll calls that they were able to provide me. For the period of January 1, 2010 to July 15, 2010 it showed a corresponding E-ZPass entry crossing the Outerbridge Crossing within an hour prior to the officer's scheduled tour of duty on all occasions. There was no E-ZPass records in the copy that we were provided by the Court for July 26, 2010 to September 25th, 2010. For the period of September 27, 2010 to October 19, 2010 it disclosed an E-ZPass entry within an hour prior to the officer's scheduled tour of duty. The officer was out sick from October 20th, 2010 until November 26, 2010.

Hengel testified that his observations showed "that when the officer was scheduled to work approximately an hour before his scheduled tour of duty or within that hour there

³ At the Court's request, this hearing was adjourned to another day for this witness to produce documentation of the specific dates and times that Hengel observed Respondent in New Jersey.

⁴ This exhibit was presented as an aid to the Court and at the Court's request.

was E-ZPass showing -- crossing on the Outerbridge Crossing." Hengel said that Respondent did not have the same tour or set schedule on all of these dates.

To provide the Court with the dates of his personal observations, Hengel had to look at his worksheet:

On this -- the one I'm looking at first is from October 25th, 2010 through March 28th of 2011. This is when we - when I conducted the initial observations on the officer. There's a second folder because the officer was out sick at a later date and we made additional observations based on a request from the Department Advocate's office to do follow-up observations to make sure that the officer was complying.

Hengel said that between November and February 16, 2011, he saw Respondent arriving ten times at the New Jersey residence. Hengel then described in detail his observations of Respondent at the residence of New Jersey on November 29, 2010, December 8, 10, 15, and 16, 2010, January 5, 12, 14 and February 14, 2011. On these dates, Respondent was assigned to the Highway District for training. Hengel said, "After November 24, Respondent was working, I believe, an 06:00 by 14:23 tour. It was an early day tour." On all those dates, before the start of his next tour, Hengel did not see any entry on the E-ZPass records showing Respondent going back into New York.

The original Department Advocate (Advocate) who had written up the charges asked Hengel to conduct additional observations to confirm that Respondent was now complying with the Department residency requirements.

Hengel testified about his observations from July 26, 2011 through October 6, 2011. He saw Respondent and/or Respondent's car in the area of [REDACTED] [REDACTED] on August 3, 5, 8, 9, and 10, 2011 and on September 8, 13, 14 and 21, 2011. This car was the same car that Hengel observed him driving before, a grey Mazda.

Hengel testified that during his first set of observations the car had New Jersey plates. In March 2011, the car was registered in New York and had New York plates.

Between July 13, 2011 and August 11, 2011 Respondent was out on sick report. During the second official Department interview, according to Hengel, Respondent “admitted to being in New Jersey on sick report,” but “didn’t say that he was living there or staying there.”

During cross-examination on February 19, 2013, Hengel acknowledged that his duties include investigating claims of injuries. Some cases may be initiated by anonymous letters or referrals, but this case was self-initiated. If Hengel sees something he thinks is inappropriate, it is his duty to investigate. There were no allegations or substantiated charges that Respondent was exaggerating his illness.

Hengel did not know how many line of duty injuries Respondent had and it was not part of his investigation. He had no idea how many surgeries Respondent had.

Regarding Specification No. 2, Hengel agreed to the following: Respondent had previously once had special permission to go to New Jersey while on sick report. Years ago when officers were out sick, they were, in the Respondent’s attorney’s words, “pretty much under house arrest.” If an officer was calling in sick, he had to stay home for 24 hours unless he had a pass or requested permission to leave. Officers would sometimes get a pass for two hours to go to a doctor’s appointment or four hours for something else. This rule changed in 2008. Respondent has been a police officer since 1997.

In 2008 the rule became that the officer only had to stay at home during what would have been the officer’s normal scheduled tour of duty. Exceptions to this new rule would be for chronic problems. For example, if a uniformed member of service (UMOS) worked midnight tour and was out on sick report, the UMOS had to stay home from

midnight to 8 a.m. But after that, the UMOS could go wherever he or she wanted as long as it was within the city of the resident county. Hengel added, "Nothing in that changed and that's been in the Patrol Guide procedure all along."

Hengel agreed that the New Jersey address and Staten Island were "fairly close". Hengel estimated that between [REDACTED] location and the [REDACTED] [REDACTED] location was "less than 20 minutes" but could not say how many miles away they were because he "never looked at the odometer."

During the time period alleged in Specification No. 2, Hengel had no evidence that Respondent was out of his residence during his tour. Hengel agreed that this charge related to the time when Respondent was free to leave his residence, he just couldn't travel to New Jersey. Respondent could have gone 100 miles in the other direction to Putnam County; as long as it wasn't during his tour, Respondent would not have been committing misconduct.

Hengel agreed that traveling 20 minutes over the bridge to New Jersey constituted misconduct because Respondent had never received permission to make that short trip. Hengel believed that in his official Department interview, Respondent admitted that he never asked for permission from anyone.

Hengel agreed that Respondent had received special permission to go to New Jersey before for a prior injury and said, "Because it was a serious injury." Hengel did not know exactly why they gave Respondent permission.

Hengel agreed that the reason he was involved in this case was because of the line of duty injury that Respondent sustained from a bad car accident while working. The order for Hengel to collect Respondent's guns was for health reasons, not for disciplinary reasons. There was no allegation Respondent had done anything wrong with his guns.

Respondent's safeguarding his firearms in a safe in New Jersey did not constitute misconduct.

Hengel agreed that when Respondent went with him, he complied with all of Hengel's requests. Hengel did not go into the residence. Hengel was not able to verify whether Respondent had a safe and did not allege that Respondent did not have a safe.

When he saw Respondent at the New Jersey residence from November 2010 through February 2011, Hengel would normally be present between 2:00 p.m. and 4:00 p.m. Hengel believed Respondent was assigned to the Highway Unit doing some sort of training, but did not know his exact tour.

When asked if Respondent's tour was 8:00 a.m. to 4:00 p.m., then would Hengel have expected Respondent to be going over the bridge at 2:00 p.m., Hengel replied, "It could take less time. He could have gone home sick. I mean, there's a million reasons why somebody leaves work early." When asked if Hengel checked any of those reasons, Hengel said no.

Hengel agreed that he went to the New Jersey location to observe Respondent there about twelve different times during that four month period. When asked if he videotaped his observations, Hengel explained, "We only use video normally for an exaggeration case⁵. We don't normally videotape regular cases."

Hengel did not observe anything to indicate that Respondent did or did not have an injury. Hengel verified that he was not focused on whether Respondent was exaggerating his injury.

⁵ Hengel explained that an exaggeration case is when there is an investigation to determine whether officers may have exaggerated their injury.

Hengel's observations were limited to a much shorter time period than the dates between January 1, 2009, and September 1, 2011. To start his investigation, he would go to the [REDACTED] location and wait there. He confirmed that in other cases, he will sometimes follow an officer to see where he goes. But in this case, the most direct approach was to go to the New Jersey location and see if he showed up after work because, Hengel indicated, most people go home after work.

Hengel did not know what tours Respondent was doing on the days he observed Respondent. He thought it was "some sort of day tour." He also said, "Some of these observations incurred overtime." One or two times Hengel waited and Respondent never showed up. Hengel believed that all the days that he went were days that Respondent was working but Hengel "never looked at the rollcall."

Hengel agreed to the following: If you're trying to establish a case, you want to show that a person is leaving work and going to a location. Hengel's initial hypothesis was that the New Jersey location was Respondent's residence and not the address Respondent had listed with the Department. It would not make sense for Hengel to go to the New Jersey location if Respondent was not working. While he could not say 100 percent, Hengel said, "pretty close to 90 percent of them were days that he was scheduled to work." When asked why he could say that, Hengel stated, "I know he was assigned to training in highway during a majority of those observations and several of those observations he came home wearing his motorcycle jacket, which you normally wouldn't wear department attire when you're off duty."

Hengel continued, "The training is done Monday through Friday and those were the days that I did the observations. And I think -- you know, I actually see most of them

were Tuesdays, Wednesdays, and Thursdays. Because I tried to go in the middle of the week.”

When Hengel would see Respondent arrive at the New Jersey location, he would take note of it, but did not videotape him. He said, “Some days I stayed a few minutes. Some days I left after I saw him come home. I didn't stay there the whole time.”

Hengel agreed that if he wanted to really keep an eye on Respondent, he could have stayed there to see when Respondent left. He did not know if Respondent stayed at this residence until the beginning of his next tour or what Respondent did. During that four month period that Hengel observed Respondent, Respondent was in training, doing some kind of day tour. He did not observe Respondent any other times.

Hengel agreed to the following: Officers are not forbidden from entering the state of New Jersey and are not encouraged to stay out of New Jersey. People who live in the Staten Island often do most of their shopping in New Jersey. A person traveling to New Jersey, even on a daily basis, is not in and of itself suspicious. If every day after his tour he goes to New Jersey, spends a few hours and then goes back to his residence, the officer is not committing misconduct. There are two ways to handle midnight; either your morning is right before the service tour or your morning is after the tour ends. Some people work midnight, go home and sleep a few hours, and that's their morning, and get up and have a whole day; other people do it the opposite: they'll get off at midnight, spend the whole day doing errands, and then sleep before going to work.

For the charges which encompass not just the four month period he was observing Respondent, Hengel relied on the E ZPass records from a two year period, adding, “And his admissions from the PG hearing.”

Hengel believed Respondent had at least two E-ZPass devices and that "there was exchange of devices in between." He agreed that an E-ZPass account can have four or five different pass tags. If you have one account, you can have more than one E-ZPass, because you might have more than one car in the house. Hengel did not know how many children Respondent had. He agreed that the E-ZPass records showed a lot of trips to New Jersey with different tag numbers. Hengel knew Respondent had more than one device. He explained, "But based on the dates that I observed him, I went back to his E-ZPass records and he was utilizing the same vehicle." Hengel agreed that not every entry on those E-ZPass records could automatically be attributed to Respondent.

Hengel agreed that, from the time he saw him, if Respondent had spent two hours in New Jersey, and then driven to the house in Staten Island and spent eight or nine hours there, then went straight to work and followed that routine, that would probably change his opinion about whether Respondent was residing in New Jersey.

Hengel agreed that police officers have a right to have a relationship, as long as it is not criminal association. There is no rule that says you can not be devoted to a person and see them every day. There is no rule against dating someone from New Jersey or going to New Jersey to see them.

Hengel did not know how long Respondent stayed in New Jersey on those ten or twelve days that Respondent went there. Hengel could not say whether if Respondent was spending the night in New Jersey, that would be misconduct.

Hengel agreed that at some point he has to decide whether a person is using one place or another as their primary residence and that this is a judgment call. If an officer is spending his nights more than half the week in New Jersey, the Department has a

problem with that. He did not know whether if during the week spending your regular day off (RDO) and one night from your tour is misconduct.

Hengel had no evidence that Respondent was voting in New Jersey. Hengel never obtained a copy of the New Jersey lease that Respondent had stated he had co-signed with his girlfriend. He did not know what the New Jersey lease said.

On cross-examination on February 25, 2013, Hengel agreed that between July 13, 2011, and August 11, 2011, when he did observations, Respondent was out on sick report and did not have to report to work during that time period. He agreed that the times he actually saw Respondent at the [REDACTED] location were not during what would have been his scheduled tour.

Hengel acknowledged that the rule is you are not allowed to leave the state while you are out sick without permission. Hengel agreed that before when Respondent was sick in 2010, that Respondent had had permission to leave the state. There was no indication that from July 13, 2011, to August 11, 2011, Respondent even asked for permission.

Hengel agreed that during his observations which were from November 2010 to February 2011, there may have been a couple of times he did not see Respondent. He agreed that his batting average was high but not 1000 percent.

He explained, "Hypothetically for a Monday to Friday schedule we would try to look at the officer Tuesday, Wednesday, and Thursday. If the officer went out of state after his last one and stayed somewhere for the weekend and came back in from that location for the first one we don't normally do the observations. . . . I try to do the observations, what would be their middle three tours of duty."

Hengel agreed that on November 15, 24, and 29 of 2010, he did observations and that those days Respondent was out on sick report. Those days were also when Respondent had permission to go to New Jersey and was convalescing from an injury after a car accident. He recalled Respondent was out sick for approximately one month.

Hengel agreed that there was nothing wrong with Respondent being in New Jersey on two of those three days, because Respondent had actually asked the Department for permission to do that. Hengel then agreed that often the Medical Division returns members before their RDO so that they have the freedom of movement during their RDOs. He also agreed that those three days were basically the time period where he asked for and received permission to stay in New Jersey.

In December Hengel went fairly frequently to observe Respondent: December 6, 8, 10, 15, 16 and 17. Hengel believed that in December, Respondent was working at Highway or going through training in Highway. Hengel was not certain where all of the training was done but knew that some of the training was at Floyd Bennett Field.

Hengel stated that before Respondent's scheduled tour of duty, there was an E-ZPass entry crossing the Outerbridge Crossing coming into Staten Island. Hengel agreed that it looks like Respondent was leaving New Jersey to get to Staten Island before his tour.

Hengel confirmed that the E-ZPass records for December corresponded to when Respondent was doing the early day tour from 6:00 a.m. to 2:00 p.m. Hengel read from his notes, "according to the roll call at the highway district, he was scheduled to do an 0600 by 1423 and he crossed anywhere between 5:11 in the morning and 5:20. For the most part."

Hengel had no idea where Respondent went after he finished his tour.

Hengel agreed that if Respondent left work at around 2:30 p.m. and went to his own home or his brother's home in Staten Island, Respondent's travel time might take a half hour. Respondent's attorney asked if Respondent decided to go straight to his listed home in Staten Island residence at 3:00 p.m. after work, spent 8 or 9 hours there, then decided to drive to New Jersey to see his girlfriend, spend a few hours with her and then come to work, has he committed misconduct? Hengel replied, "I don't have an answer for that." When asked whether he knew if Respondent did this or not, Hengel answered, "I can only testify to the dates I saw him arrive between 3:00 and 4:00 in the afternoon."

Hengel agreed that in January he did observations for four days: January 5, 12, 14 and 19. He agreed that this was consistent with the other observations he had made in December. Respondent was doing the same tour. Hengel acknowledged that he had no idea where Respondent would go after work.

Hengel agreed that for his official Department interview, Respondent did not know what the allegations were. Respondent was brought in and then notified his attorney. The attorney's name was listed incorrectly as Mr. Stan, but David Stand was the attorney's name. When Stand arrived, Hengel and Hengel's superior told Stand the allegations against Respondent. At one point during the interview, and while Hengel was present, Lieutenant Valenti asked to take a break. During that recess, Valenti or Hengel spoke to Stand. Hengel knew Stand from other Department interviews. Stand then stepped outside with Respondent where Hengel guessed they had a discussion. Shortly after that talk, the two returned and the tape was started again. After the interview resumed, Stand tried to clarify by asking Respondent questions and then Respondent gave answers about staying in New Jersey. Stand was trying to clear up with Respondent

what he thought was confusion. Respondent was told by a lieutenant that he knew he was not supposed to maintain a New Jersey license and Respondent answered yes.

When asked if a police officer is not allowed to maintain a New Jersey license, Henely replied, "As far as I know, you're not allowed to have two driver's licenses from two different states."

Hengel agreed that you definitely need to have a New York State license to be a police officer. New York State police officers can come from other states. Hengel added, "But normally when you get your license in New York State they make you surrender the license from the previous state when you get your New York license." Respondent's attorney then asked if Hengel knew this for certain, or if Hengel was guessing. Hengel replied, "I'm doing numerous residency cases on recruits. And that's part of the policy when they go to get their New York license from whatever other state they came from, they turn their license in. It says right on the New York print out. It will say previous state surrendered. It will list New York I mean, New Jersey, Connecticut, Massachusetts."

Hengel said that Respondent's license in New Jersey was under his name with "Senior" added and his license in New York was just under his name without "Senior" listed. Hengel added, "So it's possible that they didn't know."

Hengel did not know about a driver license from North Carolina. He was only aware that Respondent had the New York and New Jersey driver licenses.

On re-direct examination, Hengel clarified that he make corrections to the transcript and made a notation that it was Stand that actually asked those questions. Hengel indicated that he made a mistake when he told Respondent's counsel that it was Valenti who asked those questions.

On re-cross examination, Hengel agreed that at some point after the break, Stand took over the questions and asked leading questions of Respondent who agreed to the answers.

Respondent's Case

Respondent testified in his own behalf.

Respondent

Respondent has been a member of the Department for 17 years. He is currently on restricted duty due to an injury. Upon graduation from the Police Academy he was assigned to the Housing Bureau in Staten Island for about two years. After that he went to Staten Island Task Force for about another year and a half. Then he went to the 120 Precinct for almost ten years where he was assigned to traffic enforcement. Mostly he did traffic enforcement and summons detail.

After that he was transferred to Highway District 5. To get into the highway district, you have to have an outstanding record. They look at your sick record, your disciplinary actions and everything else in your records.

Around 2007 or 2008, Respondent was living in Staten Island at [REDACTED] [REDACTED] with his wife. He was married for 27 years. They have two children, a boy and a girl. He lived at [REDACTED] from 1997 to 2008.

Respondent and his wife grew apart and he moved to his brother's house on [REDACTED] [REDACTED] was about two miles from [REDACTED], in Staten Island. The house on [REDACTED] was still in Respondent's name and he was still paying the mortgage. He could not afford to move or rent an apartment and his

brother told him he could stay with him. In exchange, Respondent would help him out with food.

At his brother's house, he had a key to the house. He had his own room, and a bathroom upstairs. He was able to see his children.

He met someone on line, Person A, who lived in New Jersey. They started dating at the end of 2008, beginning of 2009. She lived on the border of Perth South Amboy and Old Bridge New Jersey at [REDACTED], in an apartment complex.

Madison Gardens was about seven or eight miles from [REDACTED] in Staten Island. To get there from Staten Island, he would take the Outerbridge Crossing over to Route 9 and Route 9 over to Old Bridge. Going over the Outerbridge Crossing from Staten Island to New Jersey you do not have to pay a toll; coming back you do.

Respondent testified that his E-ZPass records show that "I go to Jersey a lot." Respondent explained that at that time he had about four E-ZPass tags because his son goes to college in New Jersey and his daughter used to go to college in New Jersey. All of his family lives in New Jersey. When he was a teenager, Respondent lived in New Jersey for about four years with his aunt in Toms River. Between January 2009 and September 2011, his brother, aunt, uncles, and friends all lived in New Jersey. The only member of his family that lives in Staten Island is his brother. [REDACTED], where Respondent was living, is in the 123 precinct in Southern Staten Island, which is the closest part of Staten Island to New Jersey.

As soon as he got out of the military in 1992, Respondent started living in Staten Island. From there, he would often go to New Jersey four or five times a week for shopping and other errands. Respondent explained, "I visit my family before the storm hit. My family had a house down in Long Beach Island. I visit my aunt down in Toms

River. My friends. Like I said, I have family all over Jersey." Once he met Person A who is now his wife, he started going to New Jersey on a regular basis.

On October 19, 2010, he was doing his summons routine, and decided to go the precinct for a meal break. He explained, "I was driving up Port Richmond Avenue, when I got to a certain location. I don't remember much of what happened. The next thing I remember is I had a sergeant telling me not to move, because I was in a serious accident." He continued, "I was told that I was driving towards the precinct, which would be -- I guess that's northbound. -- They -- the sergeant and the witnesses that saw it said that I started bearing off to the left. As -- they said that the -- the witnesses thought I saw an incident happen, so they thought I was going to go investigate. And at that time they said the car took off at a high speed or rate, and into the telephone pole."

After Respondent's car hit a telephone pole, he was taken to the hospital where he spent over a week in the hospital. He was told after that he could not drive until the doctor gave him permission.

After leaving the hospital, Respondent was out of work for about two months. A sergeant who came to the hospital and who said that she was a representative of the Mayor and the Police Commissioner asked if there was anything they could do for him. Respondent asked if he could stay with his girlfriend in New Jersey.

His brother and his brother's wife both work. There was no one who would be home to take him to any appointments. Respondent received permission for the two months he was out to stay with his girlfriend in New Jersey. During that time, because Respondent had sustained a line of duty injury, the 120 precinct was sending patrol cars out to [REDACTED] to pick him up to take him to his doctors' appointments.

While he was convalescing he was accepted into Highway District 5. He was restored to full duty in November or December and was assigned to the Highway Training District in Fort Beninger⁶ in Brooklyn. That is when Hengel started his surveillance on Respondent. Respondent did not know at the time that Hengel was watching him.

Respondent explained, "Even though I was off sick, I was still on restricted duty. I wasn't allowed to participate in the training. . . . I wasn't allowed to drive, I was not allowed to have a firearm or do anything."

From December 2010 to February 14, 2011 while Hengel was observing Respondent, Respondent described, "I would get off work. I would either --we would take turns, some of the guys, driving back and forth. I would get off work, go to my house or to wherever my car was parked and they'd drop me off. And from there I would go to my house, to the house."

There were other people that were assigned to the training and Respondent would carpool with them sometimes. Respondent explained "We would -- like every other day we would carpool and save money on gas and tolls, cross the Verrazano Bridge. So some days I would meet one of the guys at the park and ride right there in Tottenville." Tottenville is "right off the . . . the Martin Luther King and Staten Island Expressway."

Every other day, Respondent would carpool with other people who were attending the training and who lived on Staten Island. Respondent clarified, "I would drive from [REDACTED], it's approximately maybe five minutes from the house, and park my car there. Because I lived in -- right in Tottenville, right next to there." Sometimes Respondent would drive a Toyota or sometimes a Mazda. Respondent was legally clear

⁶ Although the words "Fort Beninger" are in the transcript, Highway Training is conducted at Floyd Bennett Field.

to drive his car as a civilian, but the Department did not allow him to drive a Department vehicle. He would meet his colleagues in Staten Island every other day and drive in to the training.

Respondent explained, "And then at the end we would drive back to my car or I would drop him off at his car. I would go to my house at [REDACTED], take a shower, do what I have to do. And then sometime around maybe 1600 or 1700 hours, I would head to Jersey to spend some time with my girlfriend." His girlfriend, he said, "worked. She didn't get home until about six o'clock at night." Respondent did this "most of the time." He said, "I'm not going to lie. I've been to Jersey a lot." He agreed that this was during the time period right after he was convalescing.

Sometime around February, he finished his training and was assigned to Highway District 5, which meant that he stayed in the same place. Respondent testified, "At first I was doing a day tour for -- so I could finish whatever training that we had to finish. And then I went to -- straight to midnights." He explained that when he worked midnights, "My tour started at 2215 to 0653 in the morning. After my tour I would go to my residence, which is [REDACTED]. I would go to sleep -- take a shower, go to sleep for a couple hours. I would get up, do whatever I had to do in Staten Island, and then head over to my girlfriend's house around five, six o'clock, have dinner with her, spend some time. Then around nine, 9:30 p.m. I would head over to Staten Island to go to work."

When he first met Person A, she lived with her daughter, who was 21, at [REDACTED] [REDACTED] in a one-bedroom apartment. He testified, "We didn't know what was going to go on between us. As the time went on, the relationship got stronger and stronger. It was kind of -- it was kind of weird because her daughter was actually living like in the dining

room. She had a bed in the dining room, and it was a one-bedroom apartment. So she asked me if I could sign for --help her sign for a bigger lease. That way she could get a bigger apartment because she couldn't do it on one salary only. So I told her sure, that would be no problem because it gave us more privacy and it gave her daughter privacy.” Respondent never contributed to her rent. She finally got the apartment.

Respondent explained that he cosigned the lease “like when you're cosigning for a car, if she couldn't pay the rent, I would have to pay it.” Respondent put himself down as a guarantee, but never had to pay.

On December 23, 2011, he married Person A and they moved to Staten Island. Respondent found a home on [REDACTED]. Person A moved in with him before they married and her daughter went to Chicago.

Respondent testified that he still goes four or five days a week to New Jersey and that his E-ZPass records would reflect that he still travels there a “minimum of three days a week.” He drives there he said, to “go to BJ's out there, I go to Sam's, get gas out there. I drive through Jersey to go to the Bronx to her mother's house.” He still goes to New Jersey to see his brother.

Respondent has had a New Jersey license since he was 17 years old. When he became a driver, he lived in New Jersey at that time. He also had a North Carolina license and a Missouri license. He explained, “At that time I was in the military. I did 27 years in the military. So in the military you move around a lot. And so when you get to the different states, you just get their license.”

He did not remember anyone telling him that he had to renounce his licenses from other states when he joined the Department. He was never charged by the Department with maintaining a license from another state. Respondent was in the military until July

2009. When he was in the military but also a UMOS, Respondent explained, "I would do one weekend a month in Jersey, training. And then two weeks out of the year, I would do in Jersey, and then any extra days that they needed me there." It would take him about an hour to get to the military base in New Jersey.

Regarding Respondent's second set of charges, on July 13, 2011, Respondent was injured again. Respondent testified, "I was -- me and my partner were trying to make an arrest on a drunk driver that we were chasing and finally pulled over. The guy got out of the vehicle, fighting with my partner. I tried to restrain him by jumping on his back and holding him. The perpetrator fell back on top of me, fracturing three ribs, breaking my thumb, and reinjuring my neck and back." Respondent exacerbated the injury he had sustained during the previous car accident.

Because of this line of duty injury, Respondent described, "I had to use a [REDACTED]. I had -- my [REDACTED] up from [REDACTED] with the [REDACTED]. As a result of his injuries, Respondent said, "I went to the [REDACTED] to my doctor, check [REDACTED] to make sure that [REDACTED] were getting better and the [REDACTED] was getting better." He continued, "The [REDACTED], I ended up going to a specialist. Later on I found out that I [REDACTED] [REDACTED]." He already [REDACTED]. He testified, "In about a week and a half I have to go for a [REDACTED]."

Because of his injuries, Dr. Galvin from the Department's Medical Division told Respondent "that most likely I would never go back on full duty. Just with [REDACTED] [REDACTED], he says after [REDACTED] I'll probably be let loose from the Department."

The Court observed that Respondent appeared to experience much pain just sitting for the trial and had to stand up sometimes for relief.

During this second time that Respondent was injured, he was out of work for about two months, living at [REDACTED].

Respondent testified,

Well, I -- like I said, I never went out regular sick so I wasn't sure if line-of-duty regular sick was the same. You know, when I first came on this job, when you first went out sick you had to stay indoors 24/7. I guess that rule changed a couple of years ago. So what I thought -- I thought that as long as you were in your residence when you were supposed to be working, that you were good to go.

Respondent thought he just had to stay in his house only for the time he would have been working his tour. Respondent was doing midnight tours then and thought he had to stay home at [REDACTED] from midnight to eight. Respondent said,

I thought that you could go anywhere. I mean, I knew you couldn't fly to Florida or something because you had to be back in your residence. But New Jersey is right there, so I didn't know you couldn't go to Jersey.

At his official Department interview, Respondent learned that he was not allowed to go to New Jersey while out on sick report. Respondent admitted that he was guilty of traveling to New Jersey without permission from July 13, 2011 to August 11, 2011. Respondent never asked if he could go to New Jersey the second time because he was not aware he could not go to New Jersey as long as it was on his own time. The first time that he was injured he had received permission to stay with his girlfriend as long as he went to his appointments. He never had to go back to his Staten Island residence during that time.

When Respondent was notified to appear for an official Department interview, he had no idea what it was for. He found out what the allegations were when he went there the first time. Before that day, he had never spoken to an attorney.

When asked why he said he was residing in New Jersey during his interview, Respondent explained,

After we took a break, the attorney that was there at the time, which I don't really know who he was. I don't remember his name. There was actually two different attorneys that I had. The first one, he told me to just go ahead. After he talked to me, we went out and talked. He said just say yes to what they have to say and everything will be -- everything will be all right.

But Respondent did not feel that he had been residing in New Jersey.

Respondent's off-duty firearms were locked in a safe in New Jersey because "I was authorized to stay there for that time period and I wanted to keep my guns close to me. I didn't want to leave them at my brother's house. I didn't have a safe there. And the second thing is that I go to fire -- there's ranges out in Jersey that I go to fire at."

Respondent was unaware of not being allowed to have his guns in New Jersey, particularly since when Hengel investigated him, he was authorized to stay in New Jersey.

On cross examination, Respondent explained that his attorney told him during the break, "just . . . to tell them yes to the questions they asked. And my mind at that time was that I never told them that I was living in Jersey. I told them I had spent a lot time in Jersey within the last year and a half."

Respondent admitted that it was his own attorney asking him the questions. He acknowledged that he heard the questions and that there was nothing wrong with his hearing.

He confirmed that he answered yes, that he was living in New Jersey. He said, "I got confused on that question. I was never living in Jersey." However, he did not get confused when he acknowledged that he should not be living in New Jersey, explaining, "No, I knew you couldn't live in Jersey. Massachusetts either." When asked if he was confused when he acknowledged that he should not be currently living in New Jersey, Respondent replied, "No, I took it -- I heard it as do you know you couldn't be living in

Jersey." When asked if he was also confused when he agreed to correct all of these things, Respondent answered, "The reason I correct everything because I wasn't sure that you couldn't have a license in Jersey, so that license was turned back in. I wasn't -- it said in the Patrol Guide you couldn't have your car registered in Jersey, so I corrected that."

Respondent agreed that in addition to the question of the driver's license, there were a whole series of questions which he was going to correct. Respondent volunteered, "Okay, it wasn't just a question that if I was going to correct that they thought I was living in Jersey. It was a general question that would correct everything."

Respondent never testified in criminal court, but received training in 1992 about testifying in criminal court. This colloquy between the Advocate and Respondent followed:

Q. Okay. I want you to imagine a scenario where a district attorney tells you in witness prep that during cross examination, just say yes to everything the defense attorney says and everything will be okay. What would you think?

A. That's a criminal case. This wasn't a criminal case.

Q. Okay. But what would you think?

A. My understanding was after I was told all this, that I was going to get charged with being out of residence. That's what I was told.

Q. At what point?

A. The first time I went there.

Q. So you knew you were going to get charged and, knowing you were going to get charged, have the opportunity to defend yourself, you didn't do that, did you?

A. Excuse me?

Q. Your testimony is that you knew you were going to get charged before this hearing started, right?

A. I don't understand the question.

When Hengel came out to collect Respondent's guns, Respondent did not have them in Staten Island because he was authorized then to reside at [REDACTED], New Jersey with his then girlfriend. This colloquy followed:

Q. So it's your testimony that being asked when you took this job you were aware of the fact that you couldn't hold licenses in two states, that you didn't understand that to mean

that when you become a New York City police officer you're not allowed to hold licenses in two states?

A. I never used my Jersey license.

Q. Please answer the question, Officer.

A. No, I wasn't aware that you couldn't have two licenses. I knew you had to have a New York license.

Q. Okay. So when you answered yes that you were aware, that was wrong?

A. Excuse me?

Q. When you answered yes, you were aware of that --

A. Yeah, I probably got the misconception how the question was asked.

Respondent said that the lawyer at his second official Department interview did not tell him what to say and what not to say. At that time, Respondent thought that he was satisfied with his legal representation and indicated that now he was not.

Respondent agreed that during both interviews he said that he was satisfied with his legal representation. The Advocate asked Respondent why he failed to say anything when he was asked if he had anything he wanted to add. Respondent replied, "He [meaning Respondent's attorney] told me not to say anything else." Respondent acknowledged that he made a choice to follow the advice of counsel not to say anything else.

On re-direct examination, Respondent reconfirmed that he never considered himself to have lived in New Jersey, adding, "No. I never paid taxes. I never voted in Jersey. I never -- property tax or anything in Jersey."

On re-cross examination, the Advocate asked that since Respondent maintained that he was doing nothing wrong, did he tell the investigators at his second official Department interview that he stopped spending a lot of time in New Jersey to establish a defense of some kind. Respondent explained, "No, it wasn't defending. They said to go - - they told me that I could not spend - that I spent too much time in Jersey and that's why they thought I was living in Jersey. So I stopped spending a lot of time in Jersey."

Respondent continued, "And if you go through my records now, you can -- I still go to

Jersey three or four times a week." "Right", said the Advocate, "But you're not sleeping there, are you?" "I wasn't sleeping there at the time back then," Respondent replied.

FINDINGS AND ANALYSIS

Specification No. 1

Specification No. 1 states that between January 1, 2009, and September 1, 2011, Respondent resided in New Jersey without Department approval.

In October 2010, Respondent was in an accident while driving his Radio Motor Patrol (RMP). The District Surgeon thought that Respondent may have [REDACTED]

[REDACTED] Sergeant Michael Hengel of Absence Control and Investigations Unit was told to go to Respondent's residence to remove his firearms as a precaution. Hengel picked up Respondent at his brother's residence on [REDACTED] in Staten Island. Respondent told Hengel his off-duty firearms were at his girlfriend's house in New Jersey.

Hengel drove Respondent to [REDACTED] in Old Bridge, New Jersey where Respondent said he needed to pick up a key. They then drove to another residence at [REDACTED], in South Amboy, New Jersey where Respondent retrieved his firearms. Hengel found it suspicious that Respondent kept his firearms at an out of state residence.

Hengel then began surveillance of Respondent. He immediately discovered that the Respondent's vehicle, which Respondent was using to travel to and from work each day, was registered in New Jersey. Hengel also learned that the Respondent applied for a New Jersey Driver License in July 2008, applied to renew it again in December 2009 and submitted a New Jersey registration renewal in February 2011.

Over the next month, Hengel observed the Respondent on about ten occasions traveling to the [REDACTED] address in New Jersey in his vehicle right after work.

The Department submitted E-ZPass records which it claimed showed that from January 1, 2009 to November 30, 2009, within one hour before his tour in an eleven-month period on all but five dates, Respondent was driving from New Jersey.

Another set of E-ZPass records showed an E-ZPass entry crossing from New Jersey corresponding to within an hour before all of his tours from January 1 to July 15, 2010. The Department argued that Respondent's leaving this New Jersey residence every morning to go to work demonstrated that he lived there.

The Department also claimed that on May 4, 2011, during his official Department interview, Respondent admitted that he was living in New Jersey and that he knew he was not supposed to be living in New Jersey. He made this admission when questioned by his own attorney:

MR. STAND: Let me ask this: Basically were you living in Jersey with your girlfriend?

RESPONDENT: Yes.

MR. STAND: And you weren't supposed to be living in Jersey with your girlfriend?

RESPONDENT: Yes.

MR. STAND: And you maintained a New Jersey license?

RESPONDENT: Yes.

MR. STAND: And you knew you weren't supposed to maintain a New Jersey license?

RESPONDENT: Yes.

Respondent also stated that for about a year-and-a half to about two years he was staying with his girlfriend in New Jersey:

LT. VOLENTI: . . . For the last several years you've been residing at a residence in New Jersey?

RESPONDENT: Yes. For about a year and a half to around two years I've been staying with my girlfriend.

LT. VOLENTI: Okay. So then, in general, when you're going to and from work it's from a residence in New Jersey?

RESPONDENT: Yes.

LT. VOLENTI: To either - - Where was it? The 120 that you were previously?

RESPONDENT: The 120, yes.

LT. VOLENTI: And then eventually to the Highway district?

RESPONDENT: Yes.

Respondent's name was on the lease at [REDACTED], New Jersey. When he was interviewed in October, 2011 Respondent presented a lease dated September 1st, 2011 proving that he was now actually residing in Staten Island. This new lease constituted the end of Respondent's residency in New Jersey.

Respondent has argued through his attorney that Respondent consistently maintained he was from New Jersey, but was living in Staten Island. The [REDACTED] [REDACTED] address in Staten Island is about six miles from the [REDACTED] address in New Jersey. It takes only about 10 minutes to drive to New Jersey. People who live in Staten Island, especially in south Staten Island, go to New Jersey all the time

to shop. He co-signed a lease with his girlfriend only so that she would be able to rent the apartment herself.

The E ZPass record, according to Respondent, only indicates that Respondent and his family spent a lot of time in New Jersey and used four different cars. Also, while he was living with his brother, Respondent started to spend more time at his new girlfriend's home. Because he was working midnights he would go home to Staten Island, sleep, and run his errands. Then pre-midnight tour, he would go to his girlfriend's house around 4:00 p.m. or 5:00 p.m., have dinner with her when she got home from work, and spend a few hours with her. Respondent's attorney guessed that Respondent probably had to leave around 10:00 p.m. to be where he had to be for the start of his midnight tour.

Respondent contended that instead of just sitting in front of a house in New Jersey to see if he would show up, Hengel should have followed Respondent to see where he went. Hengel should have followed him every morning to see how he got to work, and where he went right after work. Respondent's counsel argued that the evidence of Hengel's observations and the E-ZPass records were not sufficient to prove Respondent guilty by a preponderance of the evidence.

Respondent's attorney maintained that the circumstances and context of Respondent's words prove that Respondent never made an admission. Respondent's initial answers in his first official Department interview and his answers in his second interview were that he was living in Staten Island with his brother. But in his first interview the investigators told him he was living in New Jersey and confronted him with the E-ZPass records. Then they took a break. His own lawyer, David Stand, was trying to get Respondent through the interview and help clarify the answers to the investigators'

questions. There was some confusion because Respondent once had permission to stay in New Jersey.

The Court cannot accept the argument that Respondent did not make an admission. Respondent was led by his own attorney to answer and clarify that he was living with his girlfriend when he knew he was not supposed to be living with her in New Jersey. Then Respondent further corroborated Hengel's observations and the E-ZPass records by conceding that for over a year and a half he was going to and from work from the New Jersey residence. Respondent's own attorney prompted this admission.

Although Hengel's observations of Respondent's travels to New Jersey and E-ZPass records showing Respondent's travels from New Jersey correspond with times before and after his tour of duty, the observations and documentation alone are not sufficient to demonstrate that Respondent was living in New Jersey. However, when combined with Respondent's admission that he was living with his girlfriend for a year and a half, one can reasonably conclude that Respondent intended to make the New Jersey residence "his principal place of abode." *Case No. 84794/08*, p. 17 (October 4, 2011). Respondent conceded that he was spending most of his time with his girlfriend in New Jersey and "the amount of time the member of the service spends at the residence is appropriately a strong indicator, if not the determinative factor in determining guilt." *Case No. 84607/08*, p. 11 (August 24, 2009) citing *Case No. 80751/05*, Police Commissioner's Memorandum (July 6, 2006). Finally, Respondent's New Jersey license and his admission of having co-signed a New Jersey lease are added indicia of residence. Therefore, the Department has proved by a preponderance of the evidence that between January 1, 2009, and September 1, 2011, Respondent was residing in New Jersey without Department approval. Accordingly, Respondent is found Guilty of Specification No. 1.

Specification No. 2

Specification No. 2 states that while on sick report, on or about and between July 13, 2011, and August 11, 2011, Respondent traveled to New Jersey without the approval of the Chief of Personnel.

After Respondent's first official Department interview, Hengel continued to observe Respondent to confirm that he had changed his residence. Hengel observed that from July 13, 2011, to August 11, 2011, while Respondent was on sick report, he continued to live in New Jersey. Respondent did this without Department approval.

Respondent pled Guilty with an explanation to Specification No. 2 and offered the following mitigation:

For his first catastrophic injury, Respondent was given permission to reside in New Jersey and did so. When he came back to full duty, got permission to drive, and was accepted into Highway District 5, Respondent did everything he could do to get back to police work. He was injured again fighting a perpetrator and had to stay home again. He went to the New Jersey location thinking that it was appropriate.

He didn't think he needed permission because he had been given it before. He was not charged with being out of his residence during his convalescence period. He stayed home when it would have been his tour. During the times that were not his tour he traveled to New Jersey. He did not realize he needed permission to do so.

PENALTY

In order to determine an appropriate penalty, Respondent's service record was examined. See *Matter of Pell v. Board of Education*, 34 NY 2d 222 (1974). Respondent was appointed to the Department on April 15, 1997. Information from his personnel

record that was considered in making this penalty recommendation is contained in an attached confidential memorandum.

Respondent's attorney argued that Respondent is a 17-year veteran with no disciplinary history, a 27-year military veteran who has given his health to the Department in two serious line-of-duty injuries that have caused him to be on sick report for months at a time. During the hearing, it was obvious that Respondent was in pain. He had already had one major surgery and at the time of this hearing was about to have another.

The Department Advocate recommended a 25 vacation day penalty. In formulating Respondent's penalty, the Court has considered that Respondent has good evaluations and has been awarded seven medals for Excellent Police Duty. Based on *Case No. 1760/10* (September 15, 2010) and *Case No. 2692/10* (November 9, 2011) in which officers with no prior disciplinary records resided in New Jersey without permission, a penalty of 20 vacation days is recommended.

Respectfully submitted,

Amy J. Porter
by *Mart & Z*
Amy J. Porter

Assistant Deputy Commissioner Trials



POLICE DEPARTMENT
CITY OF NEW YORK

From: Assistant Deputy Commissioner Trials
To: Police Commissioner
Subject: CONFIDENTIAL MEMORANDUM
POLICE OFFICER IVAN CARABALLO
TAX REGISTRY NO. 91820
DISCIPLINARY CASE NO. 2011-4918

In 2010, Respondent received an overall rating of 4.0 "Highly Competent" on his annual performance evaluation, in 2009, he received an overall rating of 3.5 Highly Competent/Competent", and in 2008, he was rated as [REDACTED] as [REDACTED] excellent Police Duty. [REDACTED]
[REDACTED] Respondent has no [REDACTED]

For your consideration.

Amy J. Porter
[Signature]

Amy J. Porter
Assistant Deputy Commissioner Trials